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Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Summary of the consultations held on the draft basic principles on the right to effective remedy for victims of trafficking in persons

Report of the United Nations High Commissioner for Human Rights

Summary

In accordance with Human Right Council resolution 20/1, the Office of the United Nations High Commissioner for Human Rights, in close cooperation with the Special Rapporteur on trafficking in persons, especially women and children, convened a series of regional and global consultations to further discuss and collect inputs on the draft basic principles on the right to an effective remedy for trafficked persons from all relevant stakeholders, including Member States, experts, intergovernmental organizations and civil society.

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I. Introduction

1. In its resolution 20/1, the Human Rights Council requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to organize, in close cooperation with the Special Rapporteur on trafficking in persons, especially women and children, consultations with States, intergovernmental bodies and civil society organizations to further discuss the draft basic principles on the right to an effective remedy for trafficked persons , and to submit a summary thereon to the Council at its twenty-sixth session. Resolution 20/1 came as a positive response to the report presented by the Special Rapporteur to the Human Rights Council at its seventeenth session,[1] in which she examined the conceptual basis of the right to an effective remedy in the context of trafficking in persons, and made recommendations on how States could better fulfil their obligations. The Special Rapporteur submitted the draft basic principles in an annex to the report with the aim of providing Member States with useful guidance in operationalizing the right to an effective remedy for victims of trafficking in persons.

2. OHCHR and the Special Rapporteur convened the following regional consultations: for Western Europe and Others and Eastern Europe, in Geneva in March 2013); for Latin America and the Caribbean, in Santiago, in July 2013; for Asia, in Bangkok ,in September 2013; for Africa, in Abuja, in November 2013; and for the Middle East and North Africa, in Amman, in January 2014. They also organized two global consultations – in New York and in Vienna, in October and November 2013 – to engage with Member States, intergovernmental organizations, experts and non-governmental actors and to solicit suggestions and input for the draft basic principles (see annex).[2]

3. The basic principles represent the culmination of the focus and work of the Special Rapporteur on the right to an effective remedy for victims of trafficking. She has consistently highlighted the fact that effective remedies are often not accessible to victims of trafficking owing to a gap between the enactment and implementation of national laws and international standards. The lack of adequate and comprehensive remedies for victims of trafficking persists despite their crucial role in ensuring the restoration of victims' human rights.

4. At the consultations, the Special Rapporteur stressed that, in order to realize fully victims' rights to effective remedies, States had to meet both substantive and procedural obligations. International human rights standards clearly provide that States have an obligation to provide for remedies to victims of gross violations of international human rights law and serious violations of international humanitarian law, including by ensuring equal and effective access to justice and prompt and adequate reparation for any harm suffered. Remedies include restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition.[3] The procedural obligations may be conceived as the range of measures needed to guarantee access to an effective remedy. Consequently, discussions were structured around this dual track of obligations.

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[1] A/HRC/17/35.

[2] Preliminary summary reports of the consultations are available from www.ohchr.org/EN/Issues/Trafficking/Pages/consultations.aspx.

[3] See the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

II. International legal framework of the right to an effective remedy

5. The right to an effective remedy for victims of human rights violations is recognized under several major international human rights instruments. In the case of victims of trafficking, the obligation to provide remedies stems from the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol). Articles 2, 6, 7 and 9 of the Protocol highlight the role of the State in ensuring that victims are treated with full respect for their human rights and offered a comprehensive range of remedies. The Convention on the Elimination of All Forms of Discrimination against Women recognizes trafficking as a human rights violation and therefore sets State obligations in this regard (art. 6). The Recommended Principles and Guidelines on Human Rights and Human Trafficking[4] refer to access to remedies, while the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law elaborate on the various forms of reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

6. Alongside provisions that directly address trafficking in persons, other instruments address the rights of victims of human right violations, such as article 2 of the International Covenant on Civil and Political Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and various conventions of the International Labour Organization (ILO), in particular ILO conventions 181 and 189.

7. According to the presentations made on the international legal framework at the various consultations, under international law, the duty of the States to provide remedies is invoked in three particular circumstances:

(a) In the case of violations that are the result of an act of or omission by a State actor;

(b) In the case of violations that are committed by non-State actors but with the acquiescence, collaboration, knowledge or acknowledgment of the State;

(c) In the event of failure by the State to exercise due diligence to prevent, investigate or prosecute a violation by private actors.[5]

In the case of trafficking in persons, the responsibility of the State to provide remedies always arises and should be extended to all individuals, whether citizens or non-citizens, under its jurisdiction.

III. Regional frameworks and initiatives

8. Different regions have developed legal frameworks and policy initiatives that reaffirm the right to remedy codified in international human rights instruments.

9. In its articles 12 to 16, the Council of Europe Convention on Action against Trafficking in Human Beings contains comprehensive provisions with regard to effective remedies for victims. Article 12 enshrines the obligation of Member States to secure

[4] E/2002/68/Add. 1.

[5] See also Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), para. 77.

shelter, medical and material assistance and counselling, while article 15 requires States to provide victims with free legal aid. The Convention is the only international legally binding instrument that contains an obligation to grant a minimum recovery period of 30 days. Article 15 of the Convention also calls upon States to guarantee compensation for victims in their national laws, while article 29 calls upon them to create anti-trafficking in persons coordinating mechanisms involving all relevant public bodies and civil society actors.

10. In its article 25, the American Convention on Human Rights, to which 23 States of the Americas are parties, provides an important base for the protection of victims of human rights abuse. In 2010, the Organization of American States adopted the Work Plan against Trafficking in Persons in the Western Hemisphere, a non-binding document that sets guidelines to help States to fulfil their obligation to provide victims with restitution, recovery (rehabilitation), compensation, satisfaction and guarantees of non-repetition.

11. In the Asia region, several important initiatives ensure the right to an effective remedy. The human rights mechanisms of the Association of Southeast Asian Nations (ASEAN) include the anti-trafficking initiatives conducted by means of the Commission on the Promotion and Protection of the Rights of Women and Children and the Criminal Justice Responses to Trafficking in Persons: ASEAN Practitioner Guidelines (2007). ASEAN has also developed a set of guidelines for the protection of the rights of trafficked children. Moreover, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime has promoted efforts to combat trafficking, including through workshops, seminars and meetings for technical experts, government officials and civil society organizations on the ratification and implementation of the United Nations Convention against Transnational Organized Crime.

12. In the Africa region, the human rights instruments of the African Union, such as the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on the Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child, guarantee individuals and peoples' rights and impose correlating duties, including specific forms of protection for women and children from forced labour, sexual exploitation and abuse, sale, trafficking and abduction, as well as remedies for redress in the event of human rights violations. In 2006, the African Union adopted the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children, which is part of the African Union Commission's Initiative against Trafficking Campaign aimed at enhancing the joint efforts of the African Union and the European Union to fight trafficking. At the subregional level, the Economic Community of West African States has also made efforts to address trafficking, including through the establishment of an anti-trafficking unit, and the development in 2009 of the Policy on Protection and Assistance to Victims of Human Trafficking in West Africa.

13. In the Middle East and North Africa region, the League of Arab States has addressed the issue of human trafficking in three conventions: in (a) a treaty on combating transnational organized crime (2012); (b) a convention on combating cybercrimes (2010); and (c) the Arab Charter on Human Rights (2004). Although the Arab Charter on Human Rights does not refer explicitly to the protection of and assistance to victims of trafficking, it does provide for the right to seek legal remedy (art. 12) and the right to compensation (arts. 8 (2), 14 (7) and 19 (2)), and requires States parties to ensure effective remedies for any person whose rights or freedoms have been violated.

IV. Common trends and issues

14. In all consultations, there was general agreement that effective remedies remained largely inaccessible, despite the existence of international and regional frameworks. The

main obstacles identified included poor implementation and interpretation of existing national legal frameworks, limited resources, capacities and infrastructure dedicated to the issue, and also gaps in identification and the tendency to criminalize victims, coupled with restrictive immigration policies.

15. During discussions on the substantive components of the right to an effective remedy, Member States and stakeholders highlighted the importance of a victim-centred and human rights-based approach, as well as the need to develop holistic, comprehensive and integrated services for victims of trafficking. Discussions on compensation triggered questions on and requests for a better conceptual definition of compensation and identification of channels through which victims can obtain compensation, delineating the responsibilities of both State and non-State actors while taking the specificities of judicial systems (common law as against the civil law system) into consideration.

16. With regard to the procedural components of the right to a remedy, participants highlighted the fact that citizenship and residency status should not be determining factors in the provision of assistance, and that States must move from a national security approach to a human rights- and victim-centred perspective to combat trafficking. Greater security and protection must be systematically offered to victims of trafficking so that they may have access to redress and recovery, through non-criminalization, the granting of unconditional assistance, the provision of temporary residence status and subsistence support. Some also stressed that the realization of procedural preconditions depended heavily on the capacity-building and training of all relevant stakeholders, including law enforcements agents and legal practitioners, as well as social services providers and civil society partners.

17. Another common theme that emerged during the consultations was the importance of cooperation and partnership at both the national and international levels with regard to mutual legal assistance and victim care. It was stressed that, at the national level, cooperation between Governments and non-governmental organizations was vital in the identification of victims and the implementation of recovery, rehabilitation and reintegration measures. At the same time, cross-border cooperation between States was also identified as necessary to ensure redress through mutual legal assistance in investigations and prosecutions, safe repatriation, guarantees of non-repetition and compensation of victims by means of joint efforts in tackling the root causes of vulnerability in countries of origin.

18. Member States referred to the ongoing challenges in prosecuting trafficking offences and the high degree of impunity for such violations, and requested guidance in reconciling the right to an effective remedy, including unconditional support for victims, with the effective prosecution of traffickers, which is possible only with the cooperation of victims.

V. Substantive components of the right to an effective remedy

A. Restitution and recovery (rehabilitation)

19. The aim of restitution was outlined at different consultations; it was suggested that the concept of the "best interest of the trafficked person" should be clearly defined to avoid different interpretations.

20. The non-obligatory nature of recovery in the Palermo Protocol was identified as an obstacle to the effective realization of the right to restitution and recovery, since it generally uses exhortative rather than prescriptive language with regard to provisions on victims' rights.

21. A recurring recommendation in all consultations was the provision of a non-conditional reflection period during which victims of trafficking would be assisted in their physical, psychological and social recovery through the provision of essential services, such as adequate shelter; counselling and information about their situation and legal rights in a language that they understand; medical, psychological and material assistance; and employment, educational and training opportunities. The reflection period was described as being essential for victims to overcome psychological and physical trauma and to gain enough confidence to engage in legal proceedings, if they so wished. In order to achieve restitution and rehabilitation, suggestions were made to establish and strengthen multidisciplinary anti-trafficking coordinating committees, one-stop centres offering a comprehensive range of services, funds for victim compensation, exemption from court fees, and legal counselling.

22. Safe repatriation was also identified as a form of restitution that is preferred by a large number of identified victims. It should be provided by countries of destination and origin alike, unless not in the best interests of the victim, when it could lead to reprisals or further human rights violations. In this regard, it was underlined that States should increase their efforts to provide victims with appropriate residence status as a form of remedy. One major obstacle to this aspect of restitution was identified as differing domestic requirements for granting such residency permits. Suggestions were however made to inscribe these measures within the obligation of the State to provide humanitarian protection for individuals in a position of vulnerability, as requested in article 7 of the Palermo Protocol.

23. Participants also pointed out that another major obstacle to achieving effective restitution was the practice in many States whereby assistance, including the granting of residency permits, is dependant on the cooperation of the victim in legal proceedings; to be effective, however, assistance should be unconditional and accessible to all victims.

24. The need to take into due consideration the diverse backgrounds, experiences, traditions and cultures of victims was also flagged as being vital when restoring what has been lost by victims, ensuring that they are not subjected to discriminatory treatment in law or in practice, and also ensuring that the individual circumstances of victims are taken duly into account.

25. Addressing the root causes of trafficking in the long term was underlined as an important aspect of restitution to ensure that victims of trafficking in persons were not returned to their pre-existing positions or put at risk of being re-trafficked. This included eradicating poverty, combating discrimination and gender-based discrimination and violence, and enhancing the rule of law.

26. It was noted that reintegration could comprise vocational placement, support for parents for child care, and micro grants to victims. These reintegration efforts could help to empower victims, address stigma, reduce vulnerability and allow victims to readjust to their communities of origin. It was suggested that, for effective reintegration in the country of origin, it is necessary to inform victims about work opportunities in their home countries in order to reduce the incidence of re-trafficking. Another recommendation was that long-term support programmes be secured so that victims may still have access to socio-psychological support well after completing reintegration. Rehabilitation programmes should also contain, when appropriate, elements of family mediation in the event that the victim is returning to the community of origin.

27. Non-governmental organizations were also recognized as key partners in realizing rehabilitation through reintegration, given that they can readily gather information on the victim's family and social context and actively follow up on the victim's situation over time. Rehabilitation was also recognized as a key factor in empowering victims so that they

are able to reintegrate into communities and act as advocates to prevent future trafficking of others from their communities.

B. Compensation

28. Compensation was widely recognized as an important element of the right to effective remedies for victims of trafficking but lacking. Numerous elements of compensation were identified, including wages from uncompensated or undercompensated labour, the cost of physical and psychological medical treatment, and recognizing the moral and emotional harm inflicted, together with collateral harm committed by the State, such as re-victimization.

29. Participants in the consultations underlined the fact that access to compensation remains limited owing to, inter alia, not only the lengthy judicial processes involving both criminal and civil proceedings but also the exclusion of victims with an irregular immigration status and victims of sex exploitation from having access to civil recourse to seek compensation for unpaid wages. Some also pointed out that victims of commercial sexual exploitation had great difficulty in obtaining financial compensation owing to stigmatization,. Economic inequalities and gender-based discrimination were identified as factors disproportionately affecting the ability of women victims to recover lost wages.

30. The widespread obstacle of insufficient funds allocated to supporting victims of trafficking was also underlined. Participants stressed that, in addition to the establishment of victims' funds, a State-funded compensation scheme could be an important restitution mechanism and an effective means for the provision of compensation. Concerns were nonetheless expressed with regard to generating and managing fund resources. Participants stressed the need to unify the scheme for the confiscation of proceeds from crimes, stating that proceeds should go directly towards support for victims, while a specific proportion of proceeds should be allocated to compensation. While appreciating that each State may have its own strategy for implementation, participants noted that a consensus on generally accepted standards for compensation and assistance for victims was needed. In this regard, it was also suggested that resources for victims' funds should not solely result from the seizure and forfeiture of traffickers' assets, but rather that States should develop alternative means to raise funds for victim support and compensation.

31. It was suggested that compensation should be considered an important means of combating trafficking that serves restorative, punitive and preventive purposes, insofar as it provides victims with the financial autonomy necessary to escape from situations of vulnerability and from the risk of being re-victimized.

VI. Procedural preconditions in realizing the right to effective remedies

32. Participants in the consultations generally agreed that victims of trafficking had not had access to the substantive components of the right to an effective remedy, mainly because they are hardly ever identified. Victim identification is the first precondition for realizing the right to remedy. Besides the matter of identification, the issue of criminalization relating to the victim's immigration status was also widely recognized as a major obstacle in the access to effective remedies. Moreover, capacity gaps were described as an important factor that affectsed both the identification and the provision of adequate support services.

33. The Special Rapporteur emphasized the need for victims to receive information on their right to obtain remedies, and pointed out that the availability of adequate information remained a challenge, given that free legal aid was often not available in many countries, while language often constituted a barrier in victims' access to information. In the regional discussions, participants also emphasized that resources and capacities were still broadly insufficient to cater for victims of trafficking adequately. The limited knowledge of prosecutors and judges about trafficking issues was identified as a major obstacle. Capacity gaps were also identified as an impediment to the proper prosecution of trafficking offences and the awarding of compensation to victims. In this regard, the need for increased capacity-building efforts and technical cooperation was stressed in all discussions.

34. According to participants, restrictive immigration policies were a major impediment in the access to remedies, because many States imposed eligibility criteria for assistance that often extended to citizenship or immigration status; victims of trafficking were therefore frequently indirectly denied justice, because they were misidentified and criminalized as irregular migrants. As a result, they were not given adequate assistance and protection, but rather faced arrest, detention, deportation or charges for immigration-related offences, solicitation of prostitution, engagement in irregular work or forgery of identity documents, thus leaving them without any opportunity to seek redress or compensation. Such restrictive policies also favour the insidious nature of trafficking, as victims are too fearful to report to the authorities. Participants stressed that, although the principle of non-criminalization was not reflected in the Palermo Protocol, it was an important issue that had to be taken into full consideration when implementing anti-trafficking policies. Other factors that discouraged victims from approaching the authorities included the fear of retribution, social stigma and the possibility of re-traumatization during legal proceedings.

35. The Special Rapporteur recommended that victims be provided with residency status in the country of destination for the duration of their period of reflection, criminal, civil or administrative proceedings, or even longer if return is not in the best interest of the victim. In this regard, the issue of victims of trafficking from populations in an emergency or crisis, such as refugees and displaced persons, was raised, in particular during one consultation; some participants requested that refugee status or permanent relocation to third countries be granted to victims in need of international humanitarian protection.

VII. Special considerations for trafficked children

36. It was widely recognized that children should be offered special protection and rehabilitation as victims of trafficking, or as minors under the care of parents or guardians who are themselves victims of trafficking. In this context, the vulnerability of children and their legal status should be at the centre of measures developed to cater for this category of victims.

37. Participants recognized that children were especially vulnerable to intimidation by traffickers and to the social stigma that can accompany trafficking in persons. These factors should be taken into consideration in the development and implementation of restitution initiatives. A longer period of reflection for child victims was recommended, as it is important to ensure their informed consent through access to information in a medium accessible and appropriate for them. With regard to compensation, a suggestion was made that any compensation awarded to child victims should remain partially under the control of the State so that it may be used by the victims once they reach the age of majority in order to give them an opportunity to build their future.

38. Specific recommendations were made with regard to the protection of child victims, including extending immigration relief to members of the immediate family of victims, the

provision of support to parents for child care, access to school and the introduction of free and compulsory basic education programmes as part of rehabilitation and reintegration initiatives. Participants also stressed that, in cases of voluntary repatriation, it was vital to ensure safe return by monitoring and evaluating the victim's environment of origin, and also to ensure that the family was not a direct actor in the trafficking of the child.

39. Participants in the consultations further highlighted the fact that greater awareness of existing gender biases was needed in the rescue and rehabilitation of girl child victims. They pointed out that girls trafficked for sex work often did not receive sufficient attention or care from social workers, and that their cases had often been handled as cases of juvenile delinquency rather than of victims of human rights violations. Proposed ways to counter such biases included giving equal weight to the testimonies of women and girls and the sustained fight against biases and inequalities, which foster the vulnerability of female victims.

VIII. Revision process

40. The draft basic principles were revised on the basis of existing international human rights law and standards, as well as oral inputs and some 30 written submissions received during the consultative process from a large range of stakeholders, including Member States, experts, participants, inter-governmental bodies and organizations and civil society. While a more detailed explanatory note on the revision process is forthcoming, some of the key changes are summarized below.

41. The term "trafficked persons" was replaced with "victims of trafficking in persons", for the sake of consistency with the scope of the right to remedy under international law, such as when a right to remedy is due to the family of a deceased victim of trafficking.

42. In response to requests by States for greater clarity on when international law mandates the right to remedy, section I (rights and obligations) clarifies the obligation of the State to provide a right to remedy – including restitution, compensation, rehabilitation and recovery, satisfaction and guarantees of non-repetition – when it commits an internationally wrongful act, meaning either that the harm is attributed to the State or it has failed to exercise due diligence. States have also an international obligation to provide and/or facilitate remedies if mandated by binding international law, such as in the treaties to which it is party. These obligations exist independently of any finding of State responsibility for the original harm and include, for example, the obligation of States parties to provide the possibility of compensation under article 6 (6) of the Palermo Protocol.

43. In response to a number of submissions, the basic principles also emphasize the importance of bilateral and multilateral State cooperation, enabling States thereby to meet their obligations on the right to a remedy, as well as of the principle of non-refoulement and access to asylum procedures as components of the right to an effective remedy.

44. Section II (on access to the right to a remedy) defines other procedural elements of the right to remedy and, in response to the submissions received, further clarifies areas such as the nature of assistance necessary for access to remedies, the scope of the reflection and recovery period, and ensuring equal access to the right to remedy, including through gender-sensitive mechanisms. The principle of non-punishment of victims of trafficking in persons and the rights to safety, privacy and confidentiality were also added as a result of the consultative process.

45. Section III (on forms of the right to remedy) addresses the substantive elements of the right to remedy, and now incorporates international law definitions of each of the forms of the right to remedy, further detail on operationalizing the remedies of restitution,

compensation, rehabilitation and recovery, and new paragraphs on the remedies of satisfaction and guarantees of non-repetition.

46. Section IV (on the right to remedy for child victims of trafficking) clarifies the additional elements necessary to ensure a human rights-based approach for trafficked children, including the scope of the requirement to give due weight to a child's views.

IX. Conclusions

47. **The Office of the High Commissioner thanks the Special Rapporteur on Trafficking in persons for the fruitful collaboration in convening and organizing the regional consultations, in fulfilment of the mandate provided by Human Rights Council resolution 20/1.**

48. **In the light of the interest raised among Member States and the numerous inputs received during the consultation process, OHCHR welcomes the basic principles and encourages the Human Rights Council to consider endorsing them with a view to Member States incorporating the principles into their domestic legal framework so that these can become a living tool for practitioners in their daily anti-trafficking work.**

Annex

Basic principles on the right to an effective remedy for victims of trafficking in persons

I. Rights and obligations

1. Victims of trafficking in persons, as victims of human rights violations, have the right to an effective remedy for any harm committed against them.

2. All States, including countries of origin, transit and destination, shall provide adequate, effective and prompt remedies to victims of trafficking in persons, including non-citizens, within their territory and subject to their jurisdiction, when the State is legally responsible for any harm committed against them; this includes when harm is attributable to the State or when the State has failed to exercise due diligence to prevent trafficking, to investigate and prosecute traffickers, and to assist and protect victims of trafficking in persons. The right to effective remedy includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

3. Regardless of whether a State is responsible for the original harm, the State shall provide and/or facilitate access to remedies as required by binding international law, including anti-trafficking instruments and international human rights law.

4. The right to an effective remedy shall be provided to victims of trafficking in persons without discrimination in law or in practice on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth or other status, including their age, their immigration status, their status as victims of trafficking in persons, their occupation or the types of exploitation to which they have been subjected.

5. The right to an effective remedy encompasses both the substantive right to remedies and the procedural rights necessary to secure access to them. The right to an effective remedy reflects a victim-centred and human rights-based approach that empowers victims of trafficking in persons and respects fully their human rights.

6. Bilateral and multilateral State cooperation is an important means enabling States to meet their obligations with regard to the right to an effective remedy for victims of trafficking in persons.

II. Access to the right to a remedy

7. Whether States are legally responsible for harm or otherwise have an obligation to provide and/or facilitate access to remedies under international law, procedural rights and preconditions for remedies include that victims of trafficking in persons:

(a) Have a legally enforceable right to have access to remedies, including through criminal, civil, labour or administrative proceedings, irrespective of the victim's immigration status, return to his or her country of origin or absence from the jurisdiction. This includes the right of victims of trafficking in persons to have effective access to asylum procedures;

(b) Are promptly and accurately identified, including through adequate procedures and appropriate training for State officials and cooperation between relevant authorities and non-governmental organizations;

(c) Are fully and promptly informed, in a language and form they understand, of their legal rights, including their right to have access to remedies, the remedies available, and procedures for obtaining remedies;

(d) Are provided with a reflection and recovery period, whether as identified or presumed victims, with access to such services as housing and psychological, medical, social, legal, employment, professional and material assistance. Following the said reflection and recovery period, a victim of trafficking in persons should be provided with any residence status necessary, such as to allow the victim of trafficking to exercise his or her right to remain during proceedings or as a form of restitution;

(e) Are provided with assistance necessary to have access to remedies, regardless of their immigration status, including medical, psychological, social, administrative and qualified linguistic and legal assistance, such as free legal aid;

(f) Are not detained, charged or prosecuted for activities that are a direct consequence of their situation as victims of trafficking in persons, including for violations of immigration law;

(g) Have a right to remain lawfully in the country in which the remedy is being sought for the duration of proceedings, without prejudice to any claim they may have to the right to remain on a more permanent basis as a remedy in itself;

(h) Have equal access to the right to remedy, including by ensuring that all investigations, prosecutions and other mechanisms are gender-sensitive; take into full account the different assistance and protection needs of women, men, girls and boys; address sexual and gender-based violence appropriately; ensure that victims are able to come forward to seek and obtain redress; prevent discriminatory evidence and afford equal weight to the testimony of women and girls; and avoid trauma, re-victimization and stigmatization;

(i) Have access to remedies that is not dependent upon their capacity or willingness to cooperate in legal proceedings;

(j) Have their rights, and the rights of their families and witnesses, to safety (including from intimidation and retaliation), privacy and confidentiality protected before, during and after proceedings.

III. Forms of the right to remedy

A. Restitution

8. States shall provide restitution that, whenever possible, restores the victim to the original situation before the trafficking except in circumstances that place the victim at risk of being re-trafficked or of further human rights violations.

9. Restitution includes, as appropriate:

(a) Restoration of liberty, including release of the victim from detention;

(b) Enjoyment of human rights and family life, including reunification and contact with family members;

(c) Safe and voluntary repatriation to one's place of residence, if applicable;

(d) Temporary or permanent residence status, refugee status or third-country resettlement on such grounds as the inability of States to guarantee that return is safe for victims of trafficking in persons and/or their families, respect for the principle of non-refoulement, the risk of re-trafficking and the risk of reprisals;

(e) Recognition of the victim's legal identity and citizenship;

(f) Restoration of the victim's employment;

(g) Assistance and support to facilitate social integration or reintegration of repatriated victims;

(h) Return of property, such as identity and travel documents and other personal belongings.

B. Compensation

10. States shall provide victims of trafficking in persons with compensation for any economically assessable damages as appropriate and proportional to the gravity of the violation and the circumstances of each case. Mere difficulty in quantifying damage shall not be invoked as a reason to deny compensation.

11. Forms of compensation include, as appropriate:

(a) Damages for physical or mental harm;

(b) Damages for lost opportunities, including employment, education and social benefits;

(c) Reimbursement of costs of necessary transportation, temporary child care, temporary housing or the movement of the victim to a place of temporary safe residence;

(d) Payment for material damages and loss of earnings, including loss of earning potential, lost income and due wages according to national law and regulations regarding wages;

(e) Moral or non-material damages resulting from moral, physical or psychological injury, emotional distress, pain or suffering;

(f) Reimbursement of legal fees and other costs or expenses incurred, including those incurred relating to the participation of the victim in criminal investigation and prosecution processes;

(g) Reimbursement of costs incurred for legal or expert assistance; medicine and medical services; physical, social, psychological or psychiatric treatment or services; or any occupational therapy or rehabilitation required by the victim;

(h) Reimbursement for any other costs or losses incurred by the victim as a direct result of being trafficked and as reasonably assessed by the relevant body or bodies.

12. States shall ensure that laws, mechanisms and procedures are in place to enable victims of trafficking in persons to have access to compensation, including:

(a) To sue offenders or others for civil and/or labour damages;

(b) To secure awards or orders from criminal courts for compensation from persons convicted of offences;

(c) To provide access to established national funds or schemes for victims of crimes and/or to establish dedicated funds or schemes for victims of trafficking in persons to claim compensation from the State for damages, including when compensation cannot be obtained from perpetrators;

(d) To freeze and confiscate the instruments and proceeds of trafficking, including for the purposes of supporting and compensating victims of trafficking in persons;

(e) To enforce reparation judgements, including foreign judgements.

C. Rehabilitation and recovery

13. States shall provide victims of trafficking in persons with the means necessary for their rehabilitation and recovery, including medical and psychological care, as well as legal and social services, such as shelter, counselling, health services and linguistic support.

14. States shall ensure that the access of victims of trafficking in persons to rehabilitation and recovery measures is not dependent on their capacity or willingness to cooperate in legal proceedings.

D. Satisfaction

15. States shall provide satisfaction as a non-financial form of reparation designed to compensate moral damage or damage to the dignity or reputation of the victims of trafficking in persons.

16. Satisfaction should include any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety, privacy and other interests of the victim of trafficking in persons, the victim's relatives, witnesses or persons who have intervened to assist the victim or to prevent the occurrence of further violations;

(c) An official declaration or a judicial decision restoring the dignity, reputation and the rights of the victim of trafficking in persons and persons closely connected with the victim, according to the circumstances of the case;

(d) Public apologies, including acknowledgement of the facts and acceptance of responsibility;

(e) Judicial and administrative sanctions against persons liable for the violations.

E. Guarantees of non-repetition

17. States shall provide guarantees of non-repetition of trafficking in persons to combat impunity and prevent future violations. Such measures include, where applicable, any or all of the following:

(a) Ensuring the effective investigation, prosecution and sanctioning of traffickers;

(b) All measures necessary to protect the victim of trafficking in persons from re-trafficking, including through safe return, temporary or permanent residence status where applicable, and integration support;

(c) Providing or strengthening the training of law enforcement, immigration and other relevant officials in the prevention of trafficking in persons;

(d) Strengthening the independence of the judiciary;

(e) Modifying legal, social and cultural practices that cause, sustain or promote tolerance to trafficking in persons, including gender-based discrimination and situations of conflict and post-conflict;

(f) Effectively addressing the root causes of trafficking, such as poverty, gender inequality and discrimination;

(g) Promoting codes of conduct and ethical norms, in particular international standards, for public and private actors, including to promote public-private partnerships against trafficking in persons;

(h) Protecting legal, medical, health-care and other related professionals and human rights defenders who assist victims of trafficking in persons.

IV. Right to remedy for child victims of trafficking

18. In addition to the above, the State shall provide and/or facilitate access to remedies for child victims of trafficking by ensuring that:

(a) The best interests of the child are a primary consideration, taking into account the individual circumstances of the child, including age, gender, degree of maturity, ethnic, cultural and linguistic background, and protection needs. When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and be treated as such until his or her age is verified;

(b) A child who is capable of forming his or her own views enjoys the right to express those views freely in all matters affecting him or her, and the views of the child are given due weight in accordance with the child's age and maturity. To enable participation by the child, States should provide trafficked children with accessible information on all matters affecting their interests, such as their situation, rights, services available and all remedies, including the processes of family reunification and/or repatriation;

(c) Procedures for obtaining access to and enforcing remedies are effective, child-sensitive and readily accessible to children and their representatives, including legal guardians appointed to represent the interests of the child;

(d) Child victims of trafficking are provided with appropriate physical, psychosocial, legal, educational, health-care and safe and suitable housing assistance and protection (including protection during legal proceedings), taking into full account their age and special vulnerabilities, rights and needs;

(e) Adequate and appropriate training on the specific needs, rights and vulnerabilities of child victims, particularly legal and psychological training, is provided for persons working with child victims of trafficking.

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Agenda items 2 and 3
Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the United Nations High Commissioner for Human Rights

Report on the seminar on the right to enjoy the benefits of scientific progress and its applications

Summary

In its resolution 20/11 of 5 July 2012, the Human Rights Council requested the Office of the United Nations High Commissioner to convene a seminar on the right to enjoy the benefits of scientific progress and its applications in order to further clarify the content and scope of that right and its relationship with other human rights and fundamental freedoms. As requested in the resolution, participants included representatives of United Nations and other international organizations, civil society and academia. The seminar was organized around six panel discussions covering the normative content of the right to enjoy the benefits of scientific progress and its applications; scientific freedom; interdependence among rights; intellectual property rights; access to information, technology and knowledge; and the right to participate in the scientific enterprise.

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I. Introduction

1. At its twentieth session, the Human Rights Council adopted resolution 20/11, in which it requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to convene in 2013 a seminar of two working days on the right to enjoy the benefits of scientific progress and its applications in order to further clarify the content and scope of that right and its relationship with other human rights and fundamental freedoms, including the right of everyone to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she was the author.

2. The Council also requested OHCHR to invite States, the Special Rapporteur in the field of cultural rights and other relevant stakeholders, including academic experts and civil society organizations, as well as relevant United Nations agencies, funds and programmes and other international organizations to participate actively in the seminar.

3. The seminar was held at Palais des Nations, Geneva, on 3 and 4 October 2013, with the Special Rapporteur in the field of cultural rights, Farida Shaheed, giving the keynote address. Experts from academia, civil society organizations, the World Health Organization (WHO), the International Telecommunication Union (ITU), the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) participated in the seminar as panellists.

4. Pursuant to the request of the Human Rights Council in resolution 20/11, the present report summarizing the key issues raised during the seminar was prepared by OHCHR for submission to the Council at its twenty-sixth session.

II. Normative framework applicable to the right to enjoy the benefits of scientific progress and its applications

5. The Committee on the Theoretical Bases of Human Rights, convened by UNESCO in 1947 to work on developing the key concepts underpinning the draft Universal Declaration of Human Rights, had considered the normative content of this right. In its statement entitled "The grounds of an international declaration of human rights", the Committee recognized the "right to share in progress", characterized by "the right to full access to the enjoyment of the technical and cultural achievements of civilization."[1] The right to enjoy the benefits of scientific progress is now well established under international human rights law and is recognized in the International Covenant on Economic, Social and Cultural Rights (art. 15, para. 1) and the Universal Declaration of Human Rights (art. 27, para. 1). Both instruments also recognize the right of everyone to the "protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".[2]

[1] UNESCO, "The grounds of an international declaration of human rights", Report of the UNESCO Committee on the Philosophic Principles of the Rights of Man to the Commission on Human Rights of the United Nations, Paris, 31 July 1947, sect. II, art. 15.

[2] International Covenant on Economic, Social and Cultural Rights, art. 15, para. 1 (c); Universal Declaration of Human Rights, art. 27, para. 2.

III. Summary of the discussions

A. Opening statement

6. The seminar was opened by Craig Mokhiber (Chief, Development and Economic and Social Issues Branch, OHCHR). He noted that scientific freedom had allowed those working at the cutting edge of their fields the opportunity to develop, to create and to influence the world through their work. While the idea that the benefits of advances in science should be shared was not new, it was regrettable that the right to enjoy the benefits of scientific progress had, in practice, been so greatly neglected over the years, with access to the benefits of scientific advancement being uneven, and the poor and marginalized being denied those benefits. He emphasized that government policy and action, failure of accountability in the private sector, poverty and poor education were among the factors implicated in that exclusion, and that the negative impact of that entrenched dynamic that set government and business against the poor and vulnerable was undeniable. In that regard, and with particular reference to the intellectual property framework, he recalled the duty of all States to meet their due diligence obligations by ensuring that human rights were not subordinated to other interests and that, when new international legal frameworks and agreements were being elaborated, comprehensive human rights impact assessments were first conducted and measures built in to safeguard human rights.

7. He welcomed the Human Rights Council's initiative in requesting OHCHR to organize the seminar, and acknowledged the work of the Special Rapporteur in the field of cultural rights in that area.

B. Normative content of the right to enjoy the benefits of scientific progress and its applications: principles and practice

8. The panel discussion on the normative content was moderated by Mpazi Sinjela (University of Lusaka) and focused on the applicable legal framework. The keynote address was given by the Special Rapporteur in the field of cultural rights, Farida Shaheed. It was followed by presentations by Lea Shaver (Robert H. McKinney School of Law, Indiana University) and Jessica Wyndham (American Association for the Advancement of Science).

9. In her presentation, the Special Rapporteur noted that the right to benefit from scientific progress and its applications, "the right to science", tended to be considered in isolation from the right to participate freely in the cultural life of the community, with which it was usually juxtaposed in relevant instruments. She indicated that, in her view, those rights were necessarily interlinked since both related to the pursuit of knowledge and understanding and to human creativity in a constantly changing world. The normative content of the right to science included access to the benefits of science by everyone, without discrimination, opportunities for all to contribute to the scientific enterprise, the freedom indispensable for scientific research, the participation of individuals and communities in decision-making, and an enabling environment fostering the conservation, development and diffusion of science and technology.

10. The Special Rapporteur identified poverty and discrimination as barriers to education and scientific enquiry, and indicated that marginalized groups such as women, children and indigenous populations were often subjected to multiple forms of discrimination in claiming their rights. With regard to research and development, it was clear that funding for private-sector research was significantly higher than public-sector funding and that governments needed to increase their investment and ensure that

government-funded research was made available to the general public, particularly marginalized groups. Governments should also implement ethical standards and codes of conduct in the area of research and development that were based on human rights standards. Finally, the Special Rapporteur underscored the need for a balance between the rights of technology holders and technology users.

11. In her presentation, Ms. Shaver noted that while science was not a basic need essential to human survival in the same manner as health care, housing and food, science and technology had the power to improve human life, raise standards of living and promote other human rights. In practical terms, the right to science implied the prioritization of universal access to essential technologies such as water purification, essential medicines, electricity, telephone and Internet services. It implied also the need to ensure universal access to scientific education and the tools for learning, with the needs of vulnerable populations and the poor taken into account in shaping the direction of scientific research and technological development. She emphasized that the vision of science in service to humanity was threatened by a new competing vision, namely science in the service of profit, where profit had come to be seen as the purpose of science and its primary incentive. In her view, the minimum core content of the right to enjoy the benefits of scientific progress needed to be further elaborated through a process of consensus-building and dialogue, which should not be discontinued prematurely.

12. Ms. Wyndham discussed the core content of the right to science from a number of perspectives. She referred to the guidance issued by the Committee on Economic, Social and Cultural Rights on State reporting, which indicated that the minimum core content included measures to ensure affordable access to the benefits of scientific progress for everyone and to prevent the use of scientific and technical progress for purposes which were contrary to the enjoyment of human rights. Other measures that had been referred to by the Committee were the protection of the freedom indispensable for scientific research, the conservation, development and diffusion of science, and the encouragement and development of international contacts and cooperation. There was broad consensus among commentators on the need to: guarantee non-discrimination and gender equality; prohibit or prevent the violation of human rights; protect the rights and address the needs of marginalized and vulnerable populations; create a participatory environment for the conservation, development and diffusion of science and technology; protect scientific freedom; and eliminate barriers to international cooperation, exchange and technology transfer. In her view, the right to science included measures to integrate scientists and scientific data, analysis and findings into government functions, including law, policy and programme development, monitoring and evaluation, as well as measures to develop and implement adequate funding mechanisms for scientific research and development.

13. During the discussion, participants addressed the importance of technology transfer, particularly transfers from developing countries to developed countries. The Special Rapporteur pointed out that guidelines on the transfer of knowledge already existed but that bilateral agreements often tended to overshadow the human rights framework. Participants discussed the importance of ensuring respect for human rights standards and principles, such as the right to participation, in the creation of an enabling environment for scientific undertakings, as well as ethical conduct. In response to the question whether scientists should be trained in human rights, several participants expressed the view that, irrespective of the technical nomenclature regarding which practitioners could be defined as scientists, the promotion of human rights in all forums was crucial, and that the implementation of the right to participation could bring scientists and human rights experts together for the purpose of mainstreaming human rights into scientific endeavour.

C. Scientific freedom

14. Presentations by Margaret Vitullo (American Sociological Association) and Irene Villasenor (University of the Philippines) opened the panel discussion on scientific freedom, which was moderated by Jessica Wyndham.

15. Ms. Vitullo stated that scientific freedom included freedom of association, inquiry, opinion and expression. Access was an important component of scientific freedom, encompassing access to the applications of science, to scientific knowledge and information, scientific literature, data, materials, samples and subjects. She referred to the synergetic relationship between the two concepts, noting that scientific freedom both depended on and provided support to access, and that limiting access to data, for example, was a major threat to scientific integrity. She cautioned that scientific freedom was, however, not absolute and must be enjoyed responsibly. Ms. Vitullo noted that the involvement of scientists in the discussion of the meaning of article 15 of the International Covenant on Economic, Social and Cultural Rights was crucial and that freedom of expression, freedom of association and freedom to travel were all key concerns for scientists. Furthermore, rights holders must view scientific information and enquiry as a right and not one exclusively for the enjoyment of scientists.

16. In her presentation, Ms. Villasenor focused on the responsibilities of scientists, drawing on a number of "soft" law instruments, such as the Recommendation on the Status of Scientific Researchers adopted by UNESCO in November 1974, and referred to the commitments made by member States following the 1999 World Conference on Science.[3] An important outcome of the conference was the Declaration on Science and the Use of Scientific Knowledge, which stated that "all scientists should commit themselves to high ethical standards, and a code of ethics based on relevant norms enshrined in international human rights instruments should be established for scientific professions" and referred to the social responsibility of scientists to maintain high standards of scientific integrity and quality control, to share their knowledge and to communicate with the public.[4] UNESCO member States had recognized that political authorities should respect that role and that the building of scientific capacity "should be supported by regional and international cooperation, to ensure both equitable development and the spread and utilization of human creativity without discrimination of any kind against countries, groups or individuals".[5]

17. During the ensuing discussion, one participant noted that scientific information was often disseminated through privately-owned press organizations and enquired whether they should assume a leading role in that respect. One delegation raised the question as to whether the mainstream media had a duty to responsibly disseminate scientific information, while another participant raised the issue of whether scientists had an obligation to convey information in an easily comprehensible form. Ms. Vitullo responded that access to information should be available on as broad a basis as possible, that the information should be of good quality and that governments had a role to play in that area. Furthermore, governments as well as the mass media had a duty to disseminate information responsibly, and scientists should be involved in advocacy, including in the dissemination of high-quality scientific information.

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[3] UNESCO, Science Agenda-Framework for Action, adopted by the World Conference on Science, Budapest, 1 July 1999.

[4] UNESCO, Declaration on Science and the Use of Scientific Knowledge, adopted by the World Conference on Science, Budapest, 1 July 1999, para. 41.

[5] Ibid., para. 35.

18. Finally, one delegation expressed the view that States had an obligation to balance scientific freedom with the interests of society when cultural factors were at play. According to the delegation, scientists, likewise, had a duty to both the community and the State.

D. Interdependence between the right to enjoy the benefits of scientific progress and its applications and other human rights

19. Peter Beyer (WHO), Jose Luis Vivero Pol (Université catholique de Louvain) and Jose Maria Batanero (ITU) discussed the relationship between the right to science and the right to health, the right to food and the rights of persons with disabilities. The panel was moderated by Rio Hada (OHCHR).

20. In his presentation, Mr. Beyer focused on the relationship between articles 12 and 15 of the International Covenant on Economic, Social and Cultural Rights, framing the discussion, in part, around innovation and access to medicines. More specifically, he noted that there was a shifting burden of disease with respect to non-communicable diseases, in that cardiovascular disease, diabetes and cancer were now not only major health challenges in developed countries, but also in the developing world. To address those challenges, new medical technologies were required, existing products must be adapted and access to both guaranteed. The issue of access, however, was extremely complex and raised important questions, including whether the price of medicines should reflect their value to shareholders or to society, whether essential medicines were public assets and whether the price should be set by the inventor or the market. States must balance their respective obligations under the International Covenant on Economic, Social and Cultural Rights so as to ensure that the inventor derived a benefit from his work and that the patient enjoyed access to affordable medicines as part of the right to health. In the current system, the innovator set the price and recovered his investment in research, development and marketing through the price of the product. That required a substantial investment and was not without risk. Consequently, the member States of the World Health Organization had turned their attention to examining new innovation models in areas where intellectual property norms were unworkable, with the debate focused on models which separate research and development costs from the price of the final product in order to ensure the improved affordability of medicines.

21. Mr. Vivero Pol noted that science was a public asset and that the realization of human rights was indispensable for facilitating access to science. In discussing the interdependence between the right to science and other human rights, such as the right to food, a key consideration was the purpose to which science was put. With regard to the right to food, the essential elements of the right were regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belonged, and which ensured a physical and mental, individual and collective, fulfilling and dignified life, free of fear. Scientific know-how in this domain was drawn from the agricultural expertise developed by national institutions, traditional agricultural knowledge and food safety considerations, among other sources. Mr. Vivero Pol argued for broad-based and inclusive consultation with a view to ensuring that poor and marginalized populations had access to innovation in agriculture as well as its benefits. With the same objective, governments should invest more in and improve the quality of agricultural research, increase access to scientific research and disseminate scientific knowledge relevant to all stages of food production and consumption.

22. Mr. Batanero noted that, although human rights treaties did not recognize a distinct and specific right to communicate, they did guarantee and protect many dimensions of

communication in the framework of provisions on the right to freedom of expression and related rights. He stated that more work was needed to examine the use of information and communication technologies (ICTs) as a means of supporting and enabling the implementation of human rights treaties, as such technologies had a unique ability to expand access to basic public services such as health and education. That issue had been discussed extensively during the negotiations leading to the adoption of the Constitution and Convention of the International Telecommunication Union, which recognized the right of the public to use the international telecommunications service. In the context of the rights of persons with disabilities, the use of ICTs could be useful in reinforcing the implementation of the Convention on the Rights of Persons with Disabilities, particularly articles 9 (accessibility), 24 (education) and 25 (health), and in promoting the development of a society in which persons with disabilities were both beneficiaries and agents of social change. The ITU played an important role in developing the technical standards and recommendations that ensured that ICTs were fully accessible to persons with disabilities and that those technologies would evolve in line with the principle of universal design.

23. During the discussion following the presentations, several participants referred to funding for research and development. One participant noted that investment in medical research was extremely costly, requiring clinical trials over a lengthy period of time. Consequently, investors had an essential role to play and open-access innovations were unlikely to result in the development of new vaccines, for instance. Obliging private entities to share information and data would discourage spending on research, which would have a negative overall impact on innovation. On the other hand, it was important to acknowledge that the end product was often unaffordable for many people.

24. The discussion also covered conflicts of interest, particularly in relation to the promotion of special interests in the dissemination of scientific information and the funding of research institutions by private actors, as well as the implications for the integrity of the research. One delegation expressed a keen interest in the preservation of traditional knowledge, and several participants noted that the protection of traditional knowledge in the area of agriculture was an important building block of the right to food in many communities, as was food sovereignty.

25. The Special Rapporteur in the field of cultural rights cautioned against limiting the ambit of the right to science to recent innovations, as many societies were yet to benefit from earlier advances, such as electricity. Moreover, implementing the right to science also involved the use of knowledge which was already in existence and which should be conserved even as new progress was registered. Similar considerations applied in the case of medicines, as drugs that were already available were frequently as effective as newly-marketed drugs.

26. Mr. Batanero indicated that, following an extensive expert consultation, ITU had recently completed a report on barriers, challenges and opportunities in ICTs, which highlighted that, as of April 2013, 15 per cent of the world's population (one billion people) had a disability that affected their access to modern communications.[6] In addition to being rights holders, that population was also a lucrative source of potential customers for both the public and private sectors, and that was one way of motivating action for the removal of barriers to access. One participant expressed the view that technology should be used to

[6] The ICT Opportunity for a Disability-Inclusive Development Framework, Synthesis report of the ICT Consultation in support of the High-Level Meeting on Disability and Development of the sixty-eighth session of the United Nations General Assembly, September 2013, available from http://www.itu.int/en/action/accessibility/Documents/The%20ICT%20Opportunity%20for%20a%20Disability_Inclusive%20Development%20Framework.pdf.

address barriers to claiming rights more broadly and that, while there was certainly a moral imperative, access to the benefits of scientific progress was also a legal right.

E. Right to enjoy the benefits of scientific progress and intellectual property rights: conflict or complementarity?

27. Presentations were made by Marco Aleman (WIPO), Mpazi Sinjela (University of Lusaka) and Frederick Abbott (Florida State University College of Law). The panel was moderated by Christian Courtis (OHCHR).

28. Mr. Aleman gave a detailed overview of the patent system, explaining that, as there were stringent criteria for the granting of patents, only exceptional inventions qualified. Article 15 of the International Covenant on Economic, Social and Cultural Rights guaranteed both the right of everyone to enjoy the benefits of scientific progress and the right of persons to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which they were the author. He noted the potential tension in the applicability of those provisions and referred to general comment No. 17 of the Committee on Economic, Social and Cultural Rights, which urged State parties to ensure that their laws and systems for the protection of creators' rights did not impede their ability to comply with core human rights obligations.[7] He indicated that it was the responsibility of States to develop intellectual property systems that balanced the rights of inventors with the rights of potential beneficiaries of new technologies, and that the Berne and Paris conventions[8] adopted by WIPO member States allowed significant latitude to States to implement their multilateral commitments. Mr. Aleman stated that flexibilities built into the patent system were an option that States could invoke to balance their obligations to protect intellectual property and human rights. Flexibilities within the multilateral treaties on intellectual property granted States the policy space to implement their multilateral commitments in the way that best responded to their domestic needs.

29. In his presentation, Mr. Sinjela stated that, since intellectual property rights were private rights, they should be granted in balance with the broader interests of society. Since human rights law recognized both private property rights (including intellectual property rights) and the right to enjoy the benefits of scientific progress, the challenge was to balance the interests of inventors with those of society. He noted that, although the Committee on Economic, Social and Cultural Rights was of the view that a balance that upheld both rights was possible, the tension between them was real. That tension was apparent in areas such as access to medicines, access to books and other educational materials and plant patents where, for instance, copyright law might conflict with the right to education and patent law with the rights to food and health. The protection of traditional knowledge and folklore in intellectual property systems was another area of tension. Typically, such knowledge had been treated as public knowledge and, therefore, not included in the patent system. Mr. Sinjela proposed that that knowledge could be recognized as the contribution of developing countries in agreeing terms for more favourable and cost-effective access to life-saving drugs. He underscored the need for a more thorough-going discussion of those issues at the level of the United Nations, taking into account the views of civil society and other stakeholders, in order to build consensus

[7] Committee on Economic, Social and Cultural Rights, general comment No. 17 (2005) on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, para. 35.

[8] Berne Convention for the Protection of Literary and Artistic Works, 1886 and Paris Convention for the Protection of Industrial Property, 1883.

towards a new intellectual property regime that was in conformity with human rights norms and standards.

30. Mr. Abbott expressed the view that it was self-evident that governments were under an international human rights legal obligation to make use of intellectual property flexibilities in appropriate circumstances. The source of that obligation might be found in a number of human rights, and more than one such right might apply in a given situation. A generalized norm relating to the obligation to use intellectual property flexibilities might be that there was an obligation to prevent the exercise of an intellectual property-based exclusive right to control a technology or an expression when there was a substantial risk to human life or health, and such risk was not adequately addressed by existing governmental resources. The obligation could also extend to situations where exclusive control of the technology or the expression was substantially impairing human development, including educational development, and the holder of the right had not offered or provided a satisfactory solution. In relation to patents, for instance, a broad range of intellectual property flexibilities was available, including discretion in the framing of the criteria for patenting, the option for parallel importation, limited exceptions to patent rights and compulsory licensing and government use. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) left substantial room for government discretion. However, such discretion was not unlimited, even though the boundaries were often unclear.

31. Many interventions focused on the use of TRIPS flexibilities, with one participant noting that, in recent years, the debate had centred on the interests of powerful States as opposed to those of less powerful States, the latter being more constrained in their ability to resort to compulsory licensing in appropriate circumstances. Several participants were of the view that the international patent system was fundamentally flawed as it promoted the financial interests of the powerful at the expense of the poor. They asserted that that positioning of trade and commercial interests above human rights and the public welfare should be revisited. One participant posed the question whether, by focusing on TRIPS flexibilities, rather than the underlying conflict between the intellectual property system and human rights norms, a concession was being made to the intellectual property regime by default. Another participant submitted that failing to consistently frame arguments for the revision of the intellectual property regime in human rights terms was possibly hindering efforts to bring human rights into the discussion.

32. Some participants noted that the patent system adversely affected the rights of small-scale farmers to retain and sell seeds, in response to which one participant referred to the flexibility available within the intellectual property regime which could permit exceptions to allow seed retention for replanting purposes. A number of other issues were raised during the discussion, including the extent to which States had positive obligations to protect access to scientific progress, the efficacy of using the patent system as the primary means of technology transfer, the extent to which publicly funded research could and should be privatized, and ownership of publicly funded inventions.

F. Access to information, technology and knowledge

33. Iryna Kuchma (Electronic Information for Libraries), Roger Pfister (Swiss Academy of Sciences/International Council for Science Committee on Freedom and Responsibility in the Conduct of Science) and Hans Morten Haugen (Diakonhjemmet University College) made presentations. The panel was moderated by Christian Courtis.

34. Ms. Kuchma emphasized that access to information and knowledge was crucial to the realization of "the right to science" and that open access repositories facilitated technology-enabled networking and collaboration, which offered fresh avenues for

scientific exploration. She noted that poor dissemination practices often resulted in far-reaching policy decisions being made without the benefit of available information. Ms. Kuchma provided an overview of the mandate of her organization, whose open access programme worked towards promoting free, immediate online access to the results of research, coupled with the right to use those results in new and innovative ways. Observing that science was increasingly interdisciplinary and that novel communication technologies permitted modes of interaction that exploited the collective intelligence of the scientific community, Ms. Kuchma focused her presentation on good practices in that area, drawing on the experience of her organization. Examples of good practices included building capacity for the establishment of open access journals and repositories, training, supporting knowledge sharing, providing expertise and empowering librarians, scholars, educators and students to be open access advocates. National and international advocacy for the adoption of open access policies and mandates was also beneficial.

35. Mr. Pfister underscored the importance of improving global access to the benefits of scientific progress by improving access to information. In that connection, he noted that the enjoyment of access to the Internet in different regions of the world had been highly variable, with populations in Africa, South America and Asia enjoying the least access. He referred to the recommendation of the International Council for Science that States should support initiatives to promote Internet connectivity at high bandwidth and affordable prices. In addition, access to hardware, software and applications should be provided, and data and information should be open, transparent and accessible. Mr. Pfister highlighted the need to promote information literacy at an early age by facilitating the use of electronic means for the sharing of data and information. Restrictions on access to information should only be permitted where the potential for harm exceeded the anticipated benefits to society.

36. While acknowledging that international human rights law did not recognize a general right to access the Internet, Mr. Haugen submitted that, based on the provisions of articles 4, 9, 21 and 30 of the Convention on the Rights of Persons with Disabilities, that right did exist for persons with disabilities. He indicated that the digital divide related to unequal access to ICTs as well as to unequal ability to make effective use of such technologies, with the latter being particularly significant for persons with disabilities. Mr. Haugen commended the progress, albeit slow, being made in the area of standard-setting. He provided, as recent examples, the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (July 2013) and ongoing negotiations within WIPO on an appropriate international legal instrument on limitations and exceptions for educational, teaching and research institutions and persons with other disabilities, scheduled for adoption in 2015.

37. During the discussion, the Special Rapporteur in the field of cultural rights highlighted the fact that language was a concern when considering access to information, as the vast majority of material available on the Internet was in English, which had the effect of excluding many people. In response, one participant acknowledged that language and the predominance of information emanating from developed countries presented challenges that, moreover, reflected existing limitations to access in developing countries. Another participant proposed that States should promote the teaching of widely spoken languages in order to facilitate improved access to information and educational materials. A number of participants were of the view that, generally, scientific research should be in English as the most widely spoken language in the international peer group of researchers. In relation to open access journals, while there was recognition that many journals provided open access after a grace period, technical information required translation in order for a broader audience to understand it and rigorous peer review of open access material remained necessary. Peer review of open access articles was often conducted on a volunteer basis and, although there were efforts to provide funding for peer review, those efforts were

poorly coordinated. Moreover, quality control applied equally to peer-reviewed limited-access journals.

G. Right to participation in the scientific enterprise

38. Moderated by Farida Shaheed, Special Rapporteur in the field of cultural rights, this panel focused on the right to participate in the scientific enterprise. Presentations were made by Abdulaziz Almuzaini (UNESCO), Hans Morten Haugen (Diakonhjemmet University College) and Jessica Wyndham (American Association for the Advancement of Science).

39. Mr. Almuzaini noted that UNESCO was created to promote United Nations values through global cooperation in education, science and culture. In 1993, UNESCO had developed a formal programme on bioethics, which was supported by extensive work in standard setting, including the Universal Declaration on the Human Genome and Human Rights (1997), the International Declaration on Human Genetic Data (2003) and the Universal Declaration on Bioethics and Human Rights (2005). After 2005, UNESCO had focused its efforts on the dissemination, promotion and application of the principles of the Universal Declaration on Bioethics and Human Rights.

40. Mr. Haugen reviewed the norms applicable to the right to participation in relation to the right to food. The International Treaty on Plant Genetic Resources for Food and Agriculture (2001), for instance, provided for States to protect and promote farmers' rights, including the right to equitably participate in sharing benefits and to participate in making decisions at the national level on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture. He noted that article 11, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights obliged States to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge and by disseminating knowledge of the principles of nutrition. He referred to general comment No. 12 of the Committee on Economic, Social and Cultural Rights, which interpreted the right to food as requiring the adoption of a national strategy to ensure food and nutrition security for all.[9] According to the general comment, strategies adopted for that purpose required full compliance with the principles of accountability, transparency and people's participation, among others. Mr. Haugen also discussed the Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security, which recommended that States take steps to ensure that members of vulnerable populations had access to opportunities and economic resources in order to participate fully and equally in the economy. Crucially, the guidelines also recommended that particular attention be paid to the specific access problems of women and of vulnerable, marginalized and traditionally disadvantaged groups.[10]

41. In her presentation, Ms. Wyndham stated that participation in science took various forms, namely, participation in political processes based on access to and understanding of scientific information, participation in decision-making on issues of personal relevance and issues pertaining to science policy and funding priorities, and participation in science as a researcher and as a research subject. As an example of good practice in ensuring

[9] Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999) on the right to adequate food, paras. 21–23.

[10] Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security, adopted by the Food and Agriculture Organization Council at its 127th session, November 2004, guideline 8.5.

participation, she referred to the consensus conferences convened by the Government of Denmark as a unique mechanism for stimulating public debate and informing science and technology policy. Past conferences had addressed issues ranging from air pollution and sustainable agriculture to genetic engineering and human reproduction. She noted that, according to UNESCO, 27 per cent of researchers were women and 60 per cent of countries had not reached gender parity in primary and secondary education. Barriers implicated in that disparity included poverty, negative stereotypes, education orientation, disabilities and "work-life" balance. ICTs were essential tools for facilitating participation at every level, from primary education to the exchange of ideas and data among scientists. Education was a prerequisite for providing everyone with an opportunity to participate and to make informed personal choices about the use of the applications of science. In conclusion, Ms. Wyndham reiterated that the benefits of science included applications, knowledge and critical thinking, which contributed to the creation of an informed and empowered citizenry. In turn, participation was required for those benefits to be realized and must be supported by education, access to modes of communication and dissemination, and funding.

42. Ms. Shaheed observed that self-determination was a major element of the right to participate in the scientific enterprise and that people should be viewed as creators and not merely consumers. One participant remarked that, in order to ensure real participation, everyone must have both access and the ability to participate, and that the political will to ensure the involvement of all without discrimination, rather than just the privileged members of society, was essential. Ms. Wyndham emphasized that the transfer of knowledge was necessary for the full participation of all members of society in the scientific enterprise and that it should be achieved through education from primary school to university level. That would allow all stakeholders the opportunity to innovate and would ultimately benefit society as a whole rather than one individual. One concern identified by several participants was that policy- and decision-making still excluded individuals and communities to a great extent, particularly where decisions were taken at the intergovernmental level. The lack of participation by women in policy- and decision-making processes was, similarly, a matter of concern.

IV. Conclusion

43. **The right to enjoy the benefits of scientific progress is a largely neglected right despite its importance for the enjoyment of other human rights and fundamental freedoms in the modern world. The participants in the seminar expressed particular interest in the relationship between the right to enjoy the benefits of scientific progress and intellectual property rights. Much of the discussion concerned the compatibility of the international intellectual property system with human rights norms and standards, and the need for significant adjustments to ensure a balanced system which accords fully with human rights norms and standards. Barriers to access to information, technology and knowledge were also reviewed at some length, with participants identifying poverty and discrimination as two impediments to access. Similarly, the full realization of the right of participation, in its various possible applications and throughout the policy- and decision-making processes, is vital if the right to enjoy the benefits of scientific progress is to come into its own.**